

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
WAYNE ANTHONY SMITH	:	NO. 90-296-18
	:	(99-CV-6117)

MEMORANDUM

Ludwig, J.

August 28, 2000

On September 14, 1998, defendant Wayne Anthony Smith pleaded guilty to conspiracy to distribute cocaine base (Cr. No. 90-296-18) and illegal reentry after deportation (Cr. No. 98-423-01) and, on November 5, 1998, was sentenced to 120 months and 24 months imprisonment, respectively – to run concurrently. On November 16, 2000, the judgment of conviction was entered and absent an appeal within 10 days, became final on November 26, 1998.<sup>1</sup> Fed. R. App. P. 4(b)(1)(A)(I). On December 2, 1999, defendant filed this § 2255 motion.

A motion under § 2255 must be filed within one year from the latest of:

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<sup>1</sup> In its motion, the government notes that the judgments in Cr. No. 98-423-01 and Cr. No. 90-296-18 were docketed on November 10, 1998 and November 12, 1998 – and adopts November 12, 1998 as the effective date of judgment. However, while the judgment in Cr. 90-296-18 was signed on November 12, 1998, it was not entered until November 16, 1998.

In addition, the judgment in Cr. No. 98-423-01 was amended on December 22, 1998 to rectify a clerical mistake. However, even assuming the amendment delayed the running of the limitations period, the lesser sentence was to run concurrently with the 120 months imposed in Cr. 90-296-18, and consequently, a favorable decision on the shorter sentence would not have affected the longer – and overall – sentence.

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by the governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making the motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

Here, defendant's conviction became final on November 26, 1998, and his petition was not filed with the clerk's office until December 2, 1999, more than a year later. A pro se prisoner's § 2255 motion is deemed filed at the moment of delivery to prison officials for mailing, Burns v. Morton, 134 F.3d 109 (3d Cir. 1998). Since it was unclear when defendant delivered his habeas petition to a prison official, he was granted additional time to supplement the record. Order, April 10, 2000.

In his supplement, defendant conceded that his petition should be deemed filed on November 29, 1999 – three days after the limitations period had expired. His argument, however, was that the limitations period was extended

until his FOIA request was processed on December 21, 1999.<sup>2</sup> The processing of a prisoner's FOIA request has been held to toll the running of the limitations period. See Edmond v. United States Attorney, 959 F. Supp. 1 (D.D.C. 1997).

[I]n accordance with the ADEPA, the one year limitation would not run until "the date on which the impediment to making a motion created by governmental action in violation of the Constitution of laws of the United States is removed." 28 U.S.C. § 2255(2). Therefore, if Plaintiff is claiming that the government is holding exculpatory material, the one year limitation would not begin to run until Plaintiff receives that evidence. Additionally, section 2255(4) provides another caveat to the one year period of limitation. The period of limitation does not begin until "the date on which the facts supporting the claim or claims discovered through the exercise of due diligence." By filing a FOIA request and further filing these proceedings, Plaintiff has demonstrated due diligence in attempting to obtain these materials. Therefore, plaintiff would not be subject to the period of limitation until after his FOIA request is processed.

Id. at 3-4.

Nevertheless, in order to take advantage of such an extension, it must be shown that the processing of the FOIA request prejudicially affected the filing of defendant's petition. See Felix v. Artuz, Civ. No. 98-6703, 2000 WL 278077 at \*2-3 (S.D.N.Y March 14, 2000). ("Petitioner has not established how his failure

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<sup>2</sup> On May 17, 1999, defendant made his FOIA request asking for all documents "in possession of your agency on myself or which makes reference to myself." Petitioner's response, Exh. A. On May 26, 1999, defendant was informed that since his request was a "Project Request" – a request for information about oneself in a criminal case – the processing takes approximately nine months. Id., Exh. B. On June 6, 1999, defendant narrowed his request. Id. On December 21, 1999, defendant's request was processed and he received the requested documents.

to receive those transcripts has impeded or prevented him from filing his habeas petition in a timely manner . . . . Moreover, there is no rational basis for the Petitioner's assertion that the factual predicate for his claim could not have been discovered earlier due to his being deprived access to the transcripts.”)

Here, defendant's petition made three claims – two concerning his rights under the Vienna Convention and one for ineffective assistance of counsel. Since there was no explanation how the delay in receiving the FOIA materials may have prejudiced his making of these claims, defendant was given time within which to submit additional argument. Order, June 2, 2000.

His supplement on this point notes only that he was diligent in attempting to obtain the FOIA materials. How the delay in receiving the materials affected his filing of his claims is not discussed. Moreover, he filed the present petition before receiving the FOIA materials, and nothing in the FOIA materials or the petition suggests that he was thereby prejudiced.

Accordingly, the one-year limitations period having run before the filing of the petition, and no prejudice attributable to the FOIA processing having been asserted, the motion to dismiss of the United States will be granted, and this action must be dismissed.

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Edmund V. Ludwig, J.

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ORDER

AND NOW, the 28<sup>th</sup> day of August, 2000, the motion to dismiss of the  
United States is granted, and this action is dismissed.

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Edmund V. Ludwig, J.